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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-640

DWIGHT GEDULDIG,
Appellant,

v.

CAROLYN AIELLO,
Individually and on Behalf of
All Others Similarly Situated,
Appellees,

DWIGHT GEDULDIG,
Appellant,

v.

AUGUSTINA D. ARMENDARIZ, ET AL.,
Individually and on Behalf of All
Other Women Similarly Situated,
Appellees,

Consolidated Cases on Appeal from the United States District Court for the Northern District of California

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BRIEF FOR GENERAL ELECTRIC COMPANY, AS AMICUS CURIAE

This brief *amicus curiae* is filed by General Electric Company with the consent of all parties,[1] as provided for in Rule 42 of the Rules of this Court.

INTEREST OF GENERAL ELECTRIC COMPANY

General Electric Company (hereinafter "GE") is engaged in the manufacture of industrial electrical equipment, products for national defense, consumer electrical appliances, electronic equipment, medical equipment, jet engines, and in addition, an almost endless array of electrical items and machinery. GE has over 250 manufacturing plants located in some 33 states and territories of the United States. It is one of the largest employers in the United States, employing more than 310,000 persons.

GE employees, of whom approximately 85,000 are females, are covered by non-occupational sickness and accident insurance which provides them with weekly income maintenance benefits for total disability resulting from non-occupational sickness or accidents. Benefit payments under such insurance are not payable, however, for any absence from work due to pregnancy or childbirth or to complications in connection therewith.

GE is the defendant in a civil suit presently pending in the United States District Court for the Eastern District of Virginia, Richmond Division (*Gilbert, et al., Plaintiffs*, v. *General Electric Company, Defendant*, No. 142-72-R), in which issues have been raised analogous to those in the case before the Court.

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[1] Letters consenting to the filing of this brief have been filed with the Clerk of the Court.

The amended complaint in the suit, which the District Court has allowed to proceed as a class action on behalf of GE female employees, alleges in substance that GE, in violation of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e, *et seq.*), has discriminated, and is discriminating, against its female employees because of their sex by maintaining in effect the above-described sickness and accident insurance with the indicated pregnancy exclusion, and by denying benefits thereunder to female employees for absences from work resulting from pregnancy or childbirth. Plaintiffs in the suit are seeking, *inter alia*, an injunction requiring the elimination of the pregnancy exclusion from GE's sickness and accident insurance coverage, and monetary damages. Trial of the suit was held in July 1973. It is anticipated that the District Court will issue a decision shortly.

Title VII of the Civil Rights Act of 1964, as amended in 1972, prohibits most private and public employers from discriminating against any individual in his employment, or from otherwise treating an employee adversely or unfairly, "because of [the] individual's . . . sex" (42 U.S.C. 2000e-2(a)), except "in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise" (42 U.S.C. 2000e-2(e)(1)). To implement this statutory prohibition, the Equal Employment Opportunity Commission has published guidelines—upon which we comment below—stating in part that "Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes,

temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment." 29 C.F.R. 1604.10.[2] Thus, although the construction and application of Title VII are not before the Court, the reach of this case must be weighed in the light of the fact that the agency charged with administering Title VII has asserted that a pregnancy exclusion like that here under attack would, if in a private or public employe disability plan, violate the statutory prohibition against sex discrimination. In this connection, it is most significant that

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[2] The relevant guidelines, in full, are as follows:

"(a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is in prima facie violation of Title VII.

"(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

"(c) Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity."

the Equal Employment Opportunity Commission in fact filed a brief in the court below in support of the instant Appellees. The brief made specific reference to the above-quoted EEOC guidelines on sex, and recited at the outset that the Commission was filing the brief "because it believes the standards the Court should apply in determining the constitutionality of § 2626 of the California Unemployment Insurance Code are similar to the standards which would be applied to the same policy if it were challenged under Title VII of the 1964 Civil Rights Act. . . . The Commission believes that, under both Title VII and the Fourteenth Amendment, a policy denying disability benefits to women workers disabled by pregnancy is illegal sex discrimination." The Commission, moreover, appeared and pressed this point in oral argument before the court below.[3] In sum, although Fourteenth Amendment and Title VII issues do not turn on the same considerations—for example, underlying Congressional intent could be decisive in ascertaining the meaning of Title VII—the likelihood exists that this case may well affect the disposition of related Title VII cases. See the statement to the same effect by Circuit Judge Winter, dissenting in

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[3] See also Memorandum For The United States As Amicus Curiae filed by the Solicitor General in Nos. 72-77 7and 72-1129, *Cleveland Board of Education* v. *La Fleur* and *Cohen* v. *Chesterfield County School Board*, —— U.S. ——, 42 LW 4186 (Jan. 21, 1974). There, in cases which also presented Fourteenth Amendment sex discrimination issues, the Solicitor General stressed the materiality of the relevant EEOC guidelines, and stated, ". . . the Court's resolution of the issue under the Equal Protection or Due Process Clause, while not dispositive may well bear on the validity of the guidelines." Memorandum, p. 2.

Cohen v. *Chesterfield County School Board*, 474 F.2d 395, 399-400 (4th Cir. 1973), decided by this Court on Jan. 21, 1974, —— U.S. ——, 42 LW 4186.[4]

SUMMARY OF ARGUMENT

I

The purpose of sickness and injury insurance is to soften the blow of an unexpected sickness or injury. A rational relationship between the pregnancy exclusion in the California statute and the statute's purpose is shown by the fact that pregnancy is not a sickness; rather it is a voluntarily induced condition.

A. Medical experts who testified in *Gilbert* v. *General Electric Company* (No. 142-72-R, United States District Court for the Eastern District of Virginia, Richmond Division) agreed that pregnancy is not a sickness. Sickness, medically speaking, is an "ab-

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[4] In addition to the *Gilbert* case, *supra*, the following Title VII cases involving disparate treatment of pregnancy in the context of insurance or sick leave plans, are now pending in United States district courts: *Grogg* v. *General Motors Corporation*, No. 73 Civ. 63, S.D. N.Y.; *Communications Workers* v. *Southern Bell Tel. & Tel. Co.*, No. 73-C-959, N.D. Ill.; *E.E.O.C.* v. *E. I. duPont deNemours & Co.*, Civil Action No. 4515, D. Del.

Two district courts have recently passed upon the issue: *Newmon* v. *Delta Air Lines, Inc.*, No. 15,681, N.D. Ga., decided Dec. 31, 1973, and as yet unreported; and *Wetzel* v. *Liberty Mutual Insurance Company*, No. 72-169, W.D. Pa., decided Jan. 9, 1974, and also as yet unreported. In *Newmon*, the court concluded that a Title VII violation had not been shown; the *Wetzel* court reached the opposite conclusion.

normal" or "morbid" condition or process which, if not corrected, leads to further debility and ultimately to death. In contrast, pregnancy, is a "normal, physiological function" or "a normal variant alteration of physiology."

It is accepted medical practice in the United States that pregnant women can continue to be employed at their usual jobs until the onset of labor. Labor, in itself, moreover, does not require medical assistance; physicians are present during labor only to prevent complications. In Europe, where delivery complications and mortality rates are better than in the United States, home deliveries by trained midwives are common. The trend in the United States has been toward hospital-type delivery and care, but the reason for this is in part to assist in helping with child nursing and to provide for the infant's psychological support.

Approximately 10-15 per cent of women have complications associated with pregnancy; but only 1-2 per cent have "major" complications, and of this number only a "very small" percentage require hospitalization.

B. The testimony of the medical experts in the *Gilbert* case also established that pregnancy can be avoided through the use of contraceptive devices which are essentially "foolproof." The pill, commonly regarded in the obstetric community as safer than childbirth, is "virtually a hundred per cent" effective. There are also other medically acceptable methods of contraception: the IUD is one and is presently only a little less effective than the pill; new models of the IUD are even more effective.

The voluntary nature of pregnancy is further shown by the existence of two back-up methods for avoiding pregnancy: abortion—now subject to principles established in *Roe* v. *Wade*, 410 U.S. 179 (1973)—and the "morning after" pill. Abortions are safe and effective; the "morning after" pill has been accepted by the Food and Drug Administration and is quite effective if used properly.

In sum, pregnancy, unlike sickness, injury, or accident, results from a cumulative exercise of free will, which is reflected in decisions to have sexual intercourse, not to use contraceptives, and not to terminate the pregnancy if it occurs. This Court itself recognized, moreover, that pregnancy is the result of deliberate choice. *Cleveland Board of Education* v. *LaFleur*, —— U.S. ——, 42 LW 4186, 4189 (1974).

II

Insurance industry practice demonstrates the rational purpose of the pregnancy exclusion under review by the Court and shows that the exclusion is rationally related to the legislative objective. Expert actuarial testimony in the *Gilbert* case, *supra*, with respect to employer-provided sickness and accident disability insurance in the United States and the treatment of pregnancy thereunder shows that the cost of providing pregnancy coverage is relatively high, and that the insurance underwriting industry has consistently excluded pregnancy from the concept of disability. The insurance industry experience is supported by relevant General Electric Company statistics also adduced in evidence in the *Gilbert* case and reproduced herein.

About 40 per cent of the work force in the United States under age 65, or some 32,168,000 employees, is covered by sickness and accident insurance. But only about 42.6 per cent of the plans, covering about 13,500,000 employees, provide a pregnancy benefit. Where provided, moreover, the pregnancy benefit is almost always limited to six weeks of benefit coverage, contrasting with the fact that 95 per cent of the existing plans provide 13 or 26 weeks benefit coverage for ordinary disabilities. The annual cost of adding maternity benefits to the sickness and accident disability income plans currently in effect in the United States would be $1,353,000,000.

There are features unique to pregnancy claims which, from an actuarial standpoint, increase the relative cost of pregnancy insurance coverage: income loss from pregnancy occurs at a predictable future time, thus inviting claim abuse; pregnancy, unlike most sicknesses and accidents, is within the insured's control; the median duration of a pregnancy claim is 15 weeks, whereas the median duration of ordinary disability claims is two weeks; a mother's concern for her child acts to cause a postponement of her return to work; and the usual control mechanisms employed by the insurance industry to counteract claim abuse and malingering are frequently ineffective where pregnancy coverage is involved. Furthermore, although generally 100 per cent of those employees who recover from short term disabilities actually come back to work, the return rate for females who have babies is only 50 per cent—a fact making the payment of a pregnancy benefit highly inconsistent with the purpose of disability insurance protection which is to protect employee earnings.

There also exists a normal cost and benefit imbalance under sickness and accident disability insurance coverage which markedly favors females over males: under existing insurance plans that do not cover maternity the cost per unit of benefit for a female employee is approximately 170 per cent of that for a male employee. Where maternity benefits are provided, the disproportion in costs between females and males is accentuated.

This Court has ruled that fiscal considerations are legitimate concerns in the area of economics and social welfare when state programs are subject to equal protection scrutiny. See *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970); *Jefferson v. Hackney*, 406 U.S. 535, 546 (1972). See also *Vlandis* v. *Kline*, 412 U.S. 441, 448 (1973), and *O'Gorman & Young* v. *Hartford Fire Ins. Co.*, 282 U.S. 251, 256 (1930).

III

The Congressional legislative history of the Equal Rights Amendment to the Constitution ("ERA") supports the argument that the pregnancy exclusion in the California statute before the Court reflects a reasonable, non-arbitrary, classification. That history shows that the ERA would not prohibit reasonable classifications based on characteristics that are unique to one sex. This was the understanding and view specifically adopted and approved in the pertinent majority Senate Report, and was also the view of the 14 members of the House Committee on the Judiciary who supported the version of the ERA which was ultimately approved by both Houses of Congress.

According to proponents of the ERA who testified in its behalf, the fundamental legal principle underlying the ERA is that a law must deal with the individual attributes of a particular person, and not with an overclassification upon an irrelevant sex factor. However, the ERA would not preclude legislation, or other official action, which relates to physical characteristics unique to one sex. So long as the characteristics are found in all women and no men, or all men and no women, a law predicated upon such characteristics would not violate the basic ERA principle, for it would raise no problem of ignoring individual characteristics in favor of a prevailing group characteristic or an average. Under this principle, supporters of the ERA repeatedly cited maternity legislation and laws governing childbearing and pregnancy as typical of legislative action which would *not* be affected by the ERA.

In sum, the Congressional legislative history underlying the ERA—which is in no way contradicted by the legislative history underlying the sex discrimination prohibition in Title VII of the Civil Rights Act of 1964—shows that where, as with the pregnancy exclusion in the California statute, there exists a basis for differentiation predicated on the unique characteristics of the female sex, a classification based on such differentiation is neither unreasonable nor unlawful.

IV

The current EEOC sex discrimination guideline relating to pregnancy and childbirth disabilities—which provides in part that "Disabilities caused or contributed to by pregnancy, miscarriage, abortion, child-

birth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment"—is not entitled to judicial deference. To implement Title VII of the Civil Rights Act of 1964, the EEOC has since November 1965 issued, and periodically amended, a series of guidelines on discrimination because of sex; but prior to 1972, when the current version was issued the guidelines were completely silent with respect to the treatment of disabilities resulting from pregnancy or childbirth. In 1965-1966, moreover, the EEOC's General Counsel issued a series of opinion letters which stated: (1) that the EEOC did not regard pregnancy to be comparable to illness or injury; (2) that an employer need not provide the same fringe benefits for pregnancy as he provides for illness; and (3) that a disability insurance benefit plan that excluded pregnancy coverage was not discriminatory.

The EEOC General Counsel who issued these opinion letters gave testimony in the *Gilbert* case, *supra*. He testified without contradiction: (1) that the letters reflected the official 1965-1966 EEOC policy and position arrived at after thorough discussion and consideration, including an inquiry into pertinent legislative history underlying Title VII; and (2) that, in the course of its 1965-1966 deliberations, the EEOC discussed and considered adopting a policy reflected in the current guideline on the treatment of pregnancy-caused disabilities under disability insurance plans, but deliberately rejected this alternative. The policy adopted by the EEOC in 1965-1966 is reflected,

moreover, in an EEOC Decision issued as late as December 1969.

Not only is the current EEOC guideline a departure from the EEOC's prior interpretation of Title VII, but it also contradicts positions taken by the Secretary of Labor implementing a Presidential order, Executive Order 11246, which prohibits sex discrimination by government contractors and subcontractors, and by the Wage and Hour Administrator under the Equal Pay Act. In addition, the current guideline conflicts with sick leave policies applied by other federal agencies to their female employees. The latter policies permit agencies to grant employees sick leave in advance of its actual accrual, but deny the advance of sick leave for pregnancy-related disabilities. This indeed was the policy of the EEOC until a policy change was effected in *May 1973*.

The EEOC, moreover, has not been consistent in applying its 1972 guideline on pregnancy and childbirth disabilities. Thus, in January 1973 the EEOC became a party to a settlement agreement resolving and discontinuing all pending litigation involving compliance by American Telephone and Telegraph Company and the Bell Companies with laws and regulations concerning equal employment opportunity. Even though the EEOC had knowledge that AT&T and the Bell Companies provide their employees with up to 52 weeks of benefits because of work absences due to sickness, but exclude from benefit eligibility female employees on maternity leave who experience normal pregnancies, the settlement agreement imposed no obligation on the companies to discontinue the latter pregnancy exclusion.

Congress has repeatedly passed statutes authorizing different treatment for men and women in similar or identical circumstances—a fact which casts doubt on the EEOC's guideline as a valid interpretation of Congressional intent. That intent is perhaps best indicated by the legislative history of the Equal Rights Amendment to the Constitution, which has been outlined above.

Administrative interpretations, like the EEOC's 1972 sex discrimination guideline relating to pregnancy and childbirth disabilities, which have not been consistently adhered to, and which are not contemporaneous with the enactment of a statute are not entitled to the judicial deference normally accorded agency interpretations. See *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944); *Udall* v. *Tallman*, 380 U.S. 1, 16-23 (1965); *National Labor Relations Board* v. *Boeing Co.*, 412 U.S. 67, 75 (1973). Cf. *Griggs, et al. v. Duke Power Company*, 401 U.S. 424, 436 (1971). *Espinoza* v. *Farah Manufacturing Co.*, —— U.S. ——, 38 L. Ed. 2d 287 (1973), where the Court refused to follow an EEOC guideline equating discrimination on the basis of citizenship with the Title VII proscription against discrimination on the basis of national origin, is controlling, because reasons there cited for rejecting the latter guideline also obtain with respect to the EEOC's 1972 guideline on pregnancy and childbirth disabilities.

ARGUMENT

I. Because Pregnancy Is Not A Disease, Sickness Or Illness, And Because It Is Voluntarily Induced, The Pregnancy Provision In The California Statute Is A Rational Provision.

In *Gilbert* v. *General Electric Company, supra*, extensive testimony by medical experts was adduced concerning the essential nature of pregnancy. Because the record in this case shows that no such testimony was taken in the court below, we think it might be helpful to the Court if we were to set out here a summary of the medical testimony in the *Gilbert* record concerning pregnancy, together with pertinent comments thereon. That testimony shows: (1) that pregnancy is not a sickness; and (2) that it is a voluntarily induced condition. As the purpose, moreover, of sickness and injury insurance is to soften the blow of an unexpected sickness or injury, the medical testimony in the *Gilbert* case—which we have no reason to believe does not reflect the common, or typical, medical view—thus establishes, we submit, a rational relationship between the pregnancy exclusion in the California statute and the statute's purpose.[5]

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[5] Section 2601 of the California Unemployment Insurance Code sets forth the purpose of California's disability insurance program. It states:

§ *2601. Purpose; construction*

The purpose of this part is to compensate in part for the wage loss sustained by individuals unemployed because of sickness or injury and to reduce to a minimum the suffering caused by unemployment resulting therefrom. This part shall be construed liberally in aid of its

Three doctors gave medical testimony in the *Gilbert* case. Two were called as witnesses by the plaintiffs: Dr. David Forrest, a Richmond physician who specializes in obstetrics and gynecology; and Dr. Andre Hellegers, professor at Georgetown University, who practices in the field of obstetrics. The third, Dr. George D. Wilbanks, Chairman of the Department of Obstetrics and Gynecology, Rush Presbyterian-St. Lukes Medical Center, Chicago, and a practicing obstetrician and gynecologist, was called as a witness by the defendant, General Electric Company.

A. *Pregnancy Is Not A Sickness.*

Drs. Forrest, Hellegers, and Wilbanks all agreed that pregnancy is a "normal physiological function" or, as Dr. Wilbanks testified, "a normal variant formational alteration of physiology" (Tr. 59, 85-86, 289, 294, 578, 588).[6] All the doctors likewise agreed that pregnancy is not a sickness,[7] disease, or illness

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declared purpose to mitigate the evils and burdens which fall on the unemployed and disabled worker and his family.
(Stats. 1953, c. 308, p. 1529, § 2601.)

[6] "Tr." references are to pages in the official transcript of proceedings in *Gilbert* v. *General Electric Company*, July 24-26, 1973.

The early symptoms of the altered physiological state brought on by pregnancy—nausea, backache, abdominal swelling, and constipation—also appear in connection with the female menstrual period (Tr. 579-580).

[7] Dr. Wilbanks testified that the period after childbirth was not a period of illness; it was rather "a period of return of the altered state of physiology back to the more usual state... to the pre-pregnancy state" (Tr. 588-589).

(Tr. 59, 289, 578).[8] Dr. Wilbanks defined disease, medically speaking, as an "abnormal state which is deleterious to the patient" (Tr. 577). Dr. Forrest, defining disease, quoted from the definition in Dorland's Dictionary: "a definite morbid process having a characteristic train of symptoms" (Tr. 13, 55-56). Dr. Hellegers testified that the most common definition of disease is "that which, if not corrected, would continue leading to further debility and ultimately to death" (Tr. 243). Contrasting pregnancy and disease, Dr. Hellegers testified graphically (Tr. 288-289):

> I seem to recall saying that I thought it would be strange if the human race survived on the basis of a disease.

Dr. Hellegers further described disease as "something that is diagnosable by a physician as abnormal" (Tr. 289). Dr. Wilbanks testified that the term "'disease' would be the medical term and 'illness' and 'sickness' would be more lay terms for a similar condition," and that in general the terms are "synonomous" (Tr. 577).

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[8] Compare, "Pregnancy, labor and delivery are states unto themselves, but they are by no means illnesses." Hazell, Lester D., "Commonsense Childbirth," xxxiv (New York, Putnam's Sons, 1969). Also quoted in "Our Bodies Ourselves," p. 157, by The Boston Women's Health Book Collective (Simon and Shuster, 1971, 1973) which, at p. 227, states with respect to the book "Commonsense Childbirth": "Written by a woman. Best over-all book for many reasons: good to read, complete, and sensible approach to childbirth. The author has had children of her own, and conveys what it feels like to give birth. She has an understanding of the source of many women's problems during childbirth. . . ."

The physicians agreed that a pregnant woman can continue to be employed on her usual job until the onset of labor (Tr. 20-21, 65, 246, 583). Dr. Hellegers stated that this is "accepted medical practice in this country" (Tr. 246). The trend in the United States during the past 20 to 25 years has been toward hospital-type delivery and care (Tr. 29),* although in England (Tr. 64-65, 582) and in Europe (Tr. 64, 325) home deliveries by trained midwives are common. Moreover, according to Dr. Hellegers, delivery complication and mortality rates for Europe "have always been better than in this country" (Tr. 325). Dr. Hellegers also stated that "overwhelmingly" the physician is present during delivery as "a prevention of complications," rather than as a "primary requirement" (Tr. 329). Labor, he testified, "in itself does not require medical assistance . . . there is really nothing that the doctor does in labor except hold hands and rub backs and encourage, you know" (Tr. 328-329). Dr. Wilbanks testified that "most women probably do benefit from having a child" (Tr. 588).

As for the complications of pregnancy—which are now covered under the California statute—the medical testimony in the *Gilbert* case shows that not all

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* Dr. Wilbanks, explaining why, in the United States, babies are delivered in hospitals, testified (Tr. 582): "I think physicians, as well as the ancillary personnel, do give support to the mother, do assist in helping with nursing. Therefore, it is not simply delivery—it is care of the mother and the infant's psychological support. I think there is something to a group of women being together after they have delivered. They can talk over their problems about the baby, the nursing and this sort of thing."

pregnancies are normal, and that approximately 10% to 15% of women have complications associated with pregnancy (Tr. 56-57, 295).[10] But not all such complications require a woman to stop work (Tr. 24): only 1% to 2% of the women with complications have those that could be classified as "major" (Tr. 57), and of this very small percentage only some require hospitalization (Tr. 58).

It is submitted that the figures derived from the medical testimony in the *Gilbert* case concerning abnormality, and highlighting the relatively small number of the major complications of pregnancy, are unimpressive statistically, logically, and realistically; and that, accordingly, to liken pregnancy to disease and sickness on the basis of the complications would be highly incongruous.

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[10] Ten per cent of all pregnancies terminate in miscarriages, or "spontaneous abortions" (Tr. 247). They occur "overwhelmingly" before the tenth week of pregnancy, and 90% occur prior to the third week (Tr. 296). Miscarriages are usually not disabling, nor is hospitalization usually required: "by and large" most are an "in and out phenomenon within one day" (Tr. 296).

The second category of "complications" are those pre-existing conditions or underlying tendencies that are aggravated or brought out by the weight gain which routinely accompanies pregnancy (Tr. 241-242, 300-304). At least one-half do not require hospitalization (Tr. 306-307). Most are subject to diagnosis prior to the pregnancy (Tr. 84-85). Usually the treatment is like the treatment of the disease itself, unaffected by the pregnancy (Tr. 257-258).

The third category are those complications which result simply from the presence of the fetus or placenta (Tr. 68-72). At least a half of these do not require hospitalization (Tr. 72, 299, 306).

B. *Pregnancy Is A Voluntarily Induced Condition*

The testimony of the medical experts in the *Gilbert* case established that pregnancy can be avoided through the use of contraceptive devices. Dr. Wilbanks testified: "I would say that we really have a pretty much unlimited method of contraception or virtually foolproof methods of contraception if you use some type of contraceptive" (Tr. 596). The pill, Dr. Forrest said, "reduce[s] the chances of pregnancy to practically zero" (Tr. 54); Dr. Hellegers testified that considering the way the population uses the pill, there would be "one pregnancy in 100 years of exposure to intercourse" (Tr. 272); and Dr. Wilbanks stated that the pill, if taken properly, "is virtually a hundred per cent" effective (Tr. 596). Dr. Forrest, moreover, testified that the pill is commonly regarded in the obstetric community as being safer than childbirth (Tr. 54-55).

In addition to the pill, there are medically acceptable alternative methods of contraception. As to one, the IUD, Dr. Wilbanks testified that it "perhaps is a little less effective" than the pill, noting, moreover, that new models are even more effective (Tr. 596). Dr. Hellegers testified that the IUD failure rate can be reduced to about four per 100 years of exposure to intercourse (Tr. 273).[11]

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[11] The Planned Parenthood Association states that foam and condoms used together are effective 99 percent of the time. A diaphragm offers 85 to 90 per cent protection and, when used in conjunction with a condom, provides over 99 per cent protection. Thus, even for women who will not or cannot use the Pill or the IUD, there are several safe methods of contraception which provide almost complete protection from pregnancy. Planned Parenthood Association-Chicago Area, "The Inside Story," p. 9 (1973).

The voluntary nature of pregnancy is further manifested by the existence of two back-up methods for avoiding pregnancy: abortion and the "morning after" pill.[12] In *Gilbert*, Dr. Wilbanks testified that under proper conditions and safeguards abortions are safe and effective (Tr. 595). One method, menstrual extraction, requires just a few minutes, and is commonly called the "lunch hour treatment" (Tr. 597). The "morning after" pill has been accepted by the Food and Drug Administration, and it is quite effective if used properly (Tr. 595).

In sum, pregnancy is neither a sickness nor a condition caused by an injury or accident. Thus pregnancy, unlike any sickness or accident, results from the cumulative, four-fold exercise of free will necessary for a woman to bear a child: (1) there must be a voluntary decision to marry, as marriage still reflects by far the current standard of morality;

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[12] In *Roe* v. *Wade*, 410 U.S. 179 (1973), the Court held that within the first trimester elective abortions are a matter solely between the pregnant woman and her doctor, and that the states cannot prohibit or regulate the exercise of that right.

At least two courts have rejected the argument that an abortion alternative to pregnancy violated a woman's First Amendment right to free exercise of religion. In *Struck* v. *Secretary of Defense*, 460 F.2d 1372 (9th Cir. 1972), vacated on other grounds, 409 U.S. 1071 (1973), an Air Force Officer faced discharge for pregnancy under an Air Force Regulation which also permitted cancellation of the discharge proceedings if the pregnancy was terminated. Captain Struck argued that as a Catholic she could not have an abortion and, therefore, she was unable to take advantage of the cancellation clause. The Ninth Circuit rejected her First Amendment argument. 460 F.2d at 1377. See, also, *Gutierrez* v. *Laird*, 346 F. Supp. 289, 293 (D.C. D.C. 1972).

(2) the couple must elect to have sexual intercourse —a two-person decision; (3) the couple must elect that conception will result—i.e., must elect to reject the various alternative methods available for avoiding pregnancy; and (4) if conception takes place, the couple must elect to accept the pregnancy and have the baby, and not to terminate the pregnancy by abortion. It should also be noted that even for the unmarried, the latter three choices are viable alternatives to the pregnant state. Finally, this Court itself has recognized that pregnancy is the result of deliberate choice. "By acting to penalize the pregnant teacher for *deciding to bear a child*, overly restrictive maternity leave regulations can constitute a heavy burden on the exercise of . . . protected freedoms." *Cleveland Board of Education* v. *La Fleur*, —— U.S. ——, 42 LW 4186, 4189 (1974) [emphasis supplied].[13]

II. Insurance Industry Practice, Which Has Consistently Excluded Pregnancy From The Concept Of Disability Because Of Cost And Other Considerations, Demonstrates The Rational Purpose Of The Pregnancy Exclusion In Section 2626 Of The California Insurance Code.

In his dissenting opinion in the court below, Judge Williams noted correctly that California's disability

[13] An article "The New Parents" in the New York Post, December 11, 1973, Magazine p. 1, describes the "mainstream" of today's thinking concerning couples having babies as follows: "Interviews with scores of expectant and reecnt parents, as well as statistical data, make it quite plain that virtually foolproof birth control, backed up by more social acceptance of couples who choose not to have children, have made the decision to have a child just that—a decision, a choice—more than has ever before been true."

benefits program was conceived by the State Legislature as an insurance program "to be operated under insurance concepts," and that the program's objective "was to protect against workers' loss of income by providing the broadest coverage and maximum benefits available within the limit of funds generated by a 1% contribution." *Aiello* v. *Hansen*, 359 F. Supp. 792, at 803-4. Accepting the "legitimacy" of the latter objective, Judge Williams concluded that the pregnancy exclusion which is the subject of this litigation was "rationally related" to such legislative objective. 359 F. Supp. at 805. See *Reed* v. *Reed*, 404 U.S. 71, 76 (1971).

In *Gilbert* v. *General Electric Company*, *supra*, evidence was adduced concerning the insurance industry practice in the United States with respect to employer-provided sickness and accident disability insurance coverage and the treatment of pregnancy thereunder. Because we believe that such evidence —which highlights the relatively high cost of covering pregnancy under such insurance, and which shows that the insurance underwriting industry has consistently excluded pregnancy from the concept of disability—buttresses Judge Williams' conclusion concerning the rational relationship between legislative objective and the pregnancy exclusion in Section 2626 of the California Insurance Code, we summarize that evidence below.[14]

Actuary Paul Jackson, a Fellow in the Society of Actuaries, who has worked in the area of disability

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[14] We also advert to uncontradicted evidence adduced in the *Gilbert* case showing General Electric Company statistics supportive of the insurance industry experience.

insurance coverage since 1956, testified in the *Gilbert* case without contradiction concerning the insurance industry practice. According to Mr. Jackson, approximately 40 per cent of the work force in the United States under age 65, or some 32,168,000 employees, is covered by sickness and accident disability insurance. The benefit periods of this insurance vary: about 45 per cent of the plans provide 13 weeks benefit coverage; 50 per cent provide coverage for 26 weeks; and only 5 per cent provide coverage for 52 weeks (Tr. 348; GE Exh. 42).[15] Only about 42.6 per cent of these plans, covering about 13,500,000 employees, provide a pregnancy benefit, and such coverage, Mr. Jackson testified, is "almost always . . . limited to six weeks . . ." (Tr. 349). Presently, moreover, the cost per unit of benefit under the existing insurance for a female employee is approximately 170 per cent of that for a male employee even where no maternity benefit is provided;[16] where a six-weeks maternity benefit is provided, the female cost per unit of benefit runs to 210 per cent of the male employee cost; and the latter percentage goes up to 300-330 per cent of the male employee cost per unit

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[15] "Tr." and "GE Exh." references are to the transcript of proceedings and the record in the *Gilbert* case. "Pre-trial Stip." references appearing below are to the parties' factual stipulations which are also included in the *Gilbert* record. See note 6 above.

[16] GE's experience supports Mr. Jackson's testimony as to the greater cost of providing female benefits. In 1970, GE's average cost per insured employee of total benefits paid under its sickness and accident insurance was $82.57 for females and $45.76 for males; in 1971, the average cost for females was $112.91 and $62.08 for males (Pre-trial Stips. 143 and 144).

of benefit where full maternity coverage is provided (Tr. 360). According to Mr. Jackson, the annual cost of adding maternity benefits to the sickness and accident disability income plans currently in effect in the United States would be $1,353,000,000 [17] (Tr. 361, GE Exh. 42).[18]

Actuary Jackson explained, moreover, that there are features unique to pregnancy claims which, from an actuarial standpoint, increase the relative cost of pregnancy insurance coverage: First, the fact that income loss will occur at a predictable time "well off in the future" allows for disability "planning" and opens the possibility of claim abuse (Tr. 354-5). Second, pregnancy, unlike most sicknesses and accidents, is not wholly beyond the control of the insured (Tr. 355). Third, the duration of ordinary disability and maternity claims is different, the median duration of the former being two weeks and the latter 15 weeks (Tr. 355).[19] Fourth, concern for

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[17] This figure was predicated upon plans currently existent in the United States. It did not allow for the possibility that the existence of the benefit might result in an increase in the birthrate (Tr. 362, 400).

[18] Another actuarial study in evidence in the *Gilbert* case, that by Alexander J. Bailie, put the additional cost per year for a 20 weeks maternity benefit at $1,005 million; for a 25 weeks benefit at $1,313 million; and for a 30 weeks benefit at $1,620 million (GE Exh. 13). Mr. Bailie, a Fellow in the Society of Actuaries since 1960, is the actuary in charge of actuarial functions pertaining to group insurance for Metropolitan Life Insurance Company.

[19] Here, too, GE's experience regarding the duration of pregnancy absences *prior to delivery* suports Mr. Jackson's testimony: In 1971, when there were 2,476 pregnancy ab-

the child and initial child care requirements act as incentives for the mother to put off resumption of work (Tr. 355-56).

There is another factor which increases the relative cost of pregnancy coverage. Actuary Jackson testified that in order to counteract the problems of claim abuse and malingering to which disability insurance is notoriously subject, various control mechanisms are employed (Tr. 346, 350). Great difficulties are connected, however, with the design of control mechanisms for maternity benefits. A so-called supervisory control, whereby individuals who abuse sickness and accident coverage are passed up for promotion or receive less merit pay increases, is frequently ineffective, as is the traditonal benefit limitation of 60% or 65% of pay (Tr. 353, 356, 390). The reason for this, Mr. Jackson testified, is that in maternity cases "approximately half of the female employees who have children do not return to work" (Tr. 353, 356). By comparison, Mr. Jackson further testified, generally 100 per cent of those employees who recover from short term disabilities actually come back to work (Tr. 354).[20] Payment of

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sences, only 15 per cent were less than 5 weeks duration, 29 per cent were between 8 and 11 weeks duration, and 22 per cent were between 12 and 15 weeks duration. In 1970, when there were 3,261 pregnancy absences, only 12 per cent were less than 5 weeks duration, 30 per cent were between 8 and 11 weeks duration, and 21 per cent were between 12 and 15 weeks duration.

[20] GE's experience shows that approximately 40 per cent of GE's female employees who have babies do not return to work. Thus in 1970, of 3,548 total pregnancies among GE female employees, 1,956 women returned to work and 1,592

"temporary sickness" benefits in instances of pregnancy would therefore be completely inconsistent with the purpose of disability insurance protection—to protect employee earnings—in that half of the recipients would actually have left the work force permanently at the time of payment.

In sum, the insurance industry experience shows that the addition of a pregnancy benefit to sickness and accident insurance coverage not only causes a significantly large increase in overall insurance costs, but it further accentuates the normal cost and benefit imbalance under such insurance which markedly favors females over males.[21]

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did not return; and in 1971, there were 2,781 total pregnancies, from which 1,634 women returned to work, and 1,147 did not return (Pre-trial Stip. 101).

In contrast to the 40% non-return rate among GE female employees who have babies are statistics reflecting general employee turnover in GE plants. A study of the 1972 employee turnover in seven GE plants selected for their large female population (Tr. 413, 417; GE Exh. 41A) revealed that the female "quits as percentage of total employment" was only 18 percent, as compared with 11 per cent for the male employees. A second study of four plants (GE Exh. 41B) showed a 10 per cent quit rate for females as compared with a 6 per cent quit rate for males.

[21] As shown, the practice of the insurance underwriting industry is to exclude pregnancy from coverage under sickness and accident disability policies. For equal protection purposes, it is noteworthy therefore that three major industrial states, including California, have by statute or regulation, recognized the significance and relevance of insurance industry practices in the context of anti-sex discrimination provisions. Thus Section 1432 of the California Fair Employment Practices Act states that: "Nothing contained in this part relating to

A. *The Cost Of Providing Pregnancy Coverage Is A Relevant And Material Consideration*

Fiscal considerations, this Court has stated, are legitimate concerns "in the area of economics and social welfare." *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970); *Jefferson* v. *Hackney*, 406 U.S. 535, 546 (1972). *Dandridge* involved an equal protection challenge to a public welfare assistance program, the Court holding that Maryland's maximum grant regulation under its aid to families with dependent children program, which called for a per capita diminution of welfare benefits for each additional child that lived in the household, did not violate the equal protection clause of the Fourteenth Amendment. The Court declared specifically that as

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discrimination on account of sex shall be deemed to affect the operation of the terms or conditions of any bona fide retirement, pension, employee benefit, or insurance plan, provided such terms or conditions are in accordance with customary and reasonable or actuarially sound underwriting practices." BNA FEP Manual, 451:132. Section XI(A) of the Illinois Sex Discrimination Guidelines states: "The Commission considers that it is a violation of the Act for an employer or labor organization to offer, contract for or participate in a group life or health insurance or other 'fringe benefit' plan which discriminates among employees or members on the basis of sex. However, differences in contributions, benefits or other provisions in such plans which are adopted in good faith based on sound actuarial data may not be deemed to violate the Act." BNA FEP Manual, 451:355. And the guidelines for applying the 1965 sex amendment of the New York Law Against Discrimination state: "In administering group life insurance, health insurance or other 'fringe benefits,' the employer may make distinctions between men and women workers to the extent that they are required by the underwriting policies of insurance carriers." BNA FEP Manual, 451:907.

Maryland was dealing with "finite resources," policy decisions had to be based on cost determinations for effectuating the program. 397 U.S. at 479. In *Jefferson*, the Court upheld procedures used by the State of Texas in its federally assisted welfare program. The Texas State Constitution provides a ceiling on the amount the State can spend on welfare assistance grants. In order to allocate this fixed pool of welfare money among the numerous individuals with acknowledged need, the State adopted a system of percentage grants. Under the system, the State first computed the monetary needs of individuals eligible for relief under each of the federally aided categorical assistance programs. Then, since the constitutional ceiling on welfare was insufficient to bring each recipient up to this full standard of need, the State applied a percentage reduction factor in order to arrive at a reduced standard of need in each category that the State can guarantee. The Court upheld the use of the percentage reduction factor in the face of an equal protection claim that it resulted in discrimination against Blacks and Mexican-Americans.[22]

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[22] Cf. *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), which held invalid a statutory waiting period required of new residents for welfare assistance eligibility, the Court said (394 U.S. at 633):

> We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its

See also *Vlandis* v. *Kline*, 412 U.S. 441 (1973), and *O'Gorman & Young* v. *Hartford Fire Ins. Co.*, 282 U.S. 251, 256 (1930). In *Vlandis*, where the Court sustained a due process attack against a Connecticut statute that created a permanent and irrebuttable presumption of non-residence for the purpose of determining tuition and other fees under the State's university system, the Court nevertheless characterized as "legitimate" the State's objective of cost equalization between bona fide residents and non residents. 412 U.S. at 448. In *O'Gorman & Young*, the Court upheld a New Jersey statute placing a ceiling on insurance agent's commissions, considering the cost to the public and to policy holders of such commissions as highly relevant.

We respectfully submit that the rationale of the California Court of Appeals in upholding Section 2626, which Judge Williams' dissent in the court below echoes, merits favorable consideration by this Court. In *Clark* v. *California Employment Stabilization Comm*, 166 Cal. App. 2d 326, 332 P.2d 716 (1958), hearing denied by Calif. Supreme Court, Feb. 11, 1959, the California Court of Appeals said (166 Cal. App. 2d at 331-332):

> Without doubt, the rate of employee contributions is related directly to the demand upon the

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citizens. . . . The saving of welfare costs cannot justify an otherwise invidious classification.

A classification based on sex is not, however, an invidious classification. *Frontiero* v. *Richardson*, 411 U.S. 677 (1973). Moreover, in *Shapiro* the Court specifically noted (394 U.S. at 633, n.10): "We are not dealing here with state insurance programs which may legitimately tie the amount of benefits to the individual's contributions."

> Fund, which, in turn, is affected by the extent of the coverage provided. . . . It is reasonable to assume that the inclusion of illness or injury caused by pregnancy within the coverage provided by the statute would increase substantially the demands upon the Fund and requier a like increase in the contribution rate. . . . It was properly within the sphere of legislative action to determine whether the objects of the statute in question would be served best by including a disability benefit which reasonably might impose upon the majority of employees a burden disproportionate to contemplated benefits in order to favor the minority who were included within the classified group. These reasons indicate that the class excluded was not arbitrarily selected, and that the purpose of the exclusion was germane to the legislative object.

Accord: *Rentzer* v. *California Unemployment Insurance Appeals Board*, 32 Cal. App. 3d 604 (1973): "We agree with the court's conclusion [in *Clark*] that the legislative purpose in enacting the pregnancy exclusion of section 2626 was to spare the unemployment disability program the costs of a maternity benefit plan."

III. The Congressional Legislative History Of The Equal Rights Amendment To The Constitution Shows That The Pregnancy Exclusion In The California Statute Reflects A Reasonable Classification Based On Characteristics Unique To The Female Sex.

In *Reed* v. *Reed*, *supra*, 404 U.S. at 76, the Court noted that the Equal Protection Clause requires that a classification be "reasonable" and "not arbi-

trary." [23] The pregnancy exclusion in the California statute here before the Court reflects a reasonable, non-arbitrary, classification based on characteristics unique to the female sex—a statement that is borne out, we submit by the Congressional legislative history of the proposed Equal Rights Amendment to the Constitution ("ERA").[24] Fourteen of the members of the House Committee on the Judiciary who supported the original version of H. J. Res. 208, the

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[23] It is to be noted that although classifications based on race, alienage, and national origin have been determined by the Supreme Court to be "suspect," sex has not been so categorized. In *Reed* v. *Reed*, the Court was specifically requested to declare sex a "suspect" classification, see 30 L. Ed. 2d at 864, but declined to do so by finding the state preference for males as estate administrators to be without any "reasonable" relationship to the state interests in question. In *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), moreover, six members of the Court did not join in Mr. Justice Brennan's opinion that all classifications based upon sex are "inherently suspect." Because sex is not an "inherently suspect" classification, the analysis utilized in the race discrimination Title VII cases, like *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), which subject inherently suspect classifications by race to strict judicial scrutiny to determine if an overriding or compelling contrary interest justifies their use, is totally inapplicable.

[24] As approved by the Congress, the ERA provides:

> Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
>
> Section 2. The Congress shall have power to enforce this article by appropriate legislation.
>
> Section 3. This Amendment shall take effect two years after the date of ratification.

version of the ERA ultimately approved by both houses of Congress, stated as their Separate Views on H. J. Res. 208: [25]

> The legal principle underlying the Equal Rights amendment as proposed by Mrs. Griffiths [Rep. Martha Griffiths of Michigan] is that the law must deal with the individual attributes of the particular person and not with stereotypes or over-classification based on sex. However, the original resolution does not require that women must be treated in all respects the same as men. "Equality" does not mean "sameness". *As a result, the original resolution would not prohibit reasonable classifications based on characteristics that are unique to one sex. For example, a law providing for payment of the medical costs of child bearing could only apply to women.* In contrast, if a particular characteristic is found among members of both sexes, then under the proposed amendment it is not the sex factor but the individual factor which should be determinative. [Emphasis added.]

The majority Report of the Senate Committee on the Judiciary on the ERA specifically approved this quoted excerpt from H.R. Rep. No. 92-359. The Senate Committee stated that: [26]

> The Separate Views of Congressman Edwards and 13 other members of the House Judiciary Committee in the House Report on the equal rights amendment, H.R. Rep. 92-359, state con-

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[25] H. R. Rep. No. 92-359, 92nd Cong., 1st Sess. 7 (1971).

[26] As introduced into the Congressional Record by Sen. Bayh of Indiana, 118 Cong. Rec. S 4584-5 (daily ed. March 22, 1972).

> cisely and accurately the understanding of the proponents of the Amendment. [The majority Report then quotes several paragraphs from the Separate Views, including the one quoted above.]

These Reports were based in part on testimony given at the subcommittee hearings by a number of strong advocates of the ERA. Among these was Representative Martha Griffiths of Michigan, who was one of the leaders of the effort to obtain Congressional approval for the ERA. In her testimony before the House Sub-committee considering the proposed amendment, Rep. Griffiths indicated the limits on "sex discrimination" as that concept would be treated under the ERA. In explaining what the amendment would *not* do, she testified: [27]

> Like private action, governmental action dealing with a physical characteristic unique to one sex would not be affected by the equal rights amendment. Where a law deals with a physical characteristic unique to one sex, equality between the sexes could not be achieved, for such a law could not apply in practice to both sexes. Therefore, the equal rights amendment would not affect laws dealing with a physical characteristic

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[27] Hearings before Subcommittee No. 4 of the Committee on the Judiciary, House of Representatives, 92nd Cong., 1st Sess., on H. J. Res. 35, 208, and Related Bills and H.R. 916 and Related Bills 40 (1971). (Hereinafter cited as "ERA House Hearings".) To the same effect see testimony of Rep. Bella Abzug of New York, *Id.* at 116; and testimony of Betty Friedan, founder of the National Organization for Women, Hearings on S.J. Res. 61 before the Subcommittee on Constitutional Amendments of the Committee on the Judiciary, U.S. Senate, 91st Cong., 2d Sess. 493 (1970). (Hereinafter cited as "ERA Senate Subcommittee Hearings.")

> unique to one sex, such as laws governing childbearing, sperm donation, or criminal acts capable of being committed by members of only one sex.

And in response to questioning on whether the ERA would prohibit all classifications taking account of sex, Representative Griffiths again acknowledged the natural limitation on the scope of the Amendment: [28]

> But you would have to have some distinction in laws that apply to mothers, to pregnant women, because men aren't pregnant. You don't have to have the same law applying because of different functions of the body. The bodies are not exactly the same, so there could be a difference.

The position taken by Representative Griffiths is clearly the most sensible approach to the general question of what constitutes a reasonable classification based on sex, and the same position was repeatedly adopted by supporters of the ERA. Even witnesses who claimed to endorse a more "absolutist" interpretation of the ERA endorsed the position. Thus Lucille H. Shriver, Federation Director, The National Federation of Business and Professional Women's Clubs, Inc. in her statement before the House Subcommittee stated: [29]

> The significant point always is: Is the distinction one of sex alone or, is there something added or some special function served. On this basis, for example, maternity legislation would not be

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[28] ERA House Hearings 51.

[29] ERA House Hearings 156. To the same effect, testimony of Jean Faust, Assistant on Women's Rights to Rep. William F. Ryan of New York, ERA House Hearings 103.

> affected by the equal rights amendment. Maternity legislation affects only females . . . . The fact is, that maternity legislation can be available only to women because they alone, physiologically, house the prenatal child and childcarrying is the criterion for maternity legislation.

Quite obviously such an interpretation is, in substance, identical with that of Rep. Griffiths.

The most comprehensive analysis of the limits on the scope of the proposed ERA was presented to both the Senate and House committees by Thomas I. Emerson, Lines Professor of Law, Yale Law School.[30] Professor Emerson testified before the Senate Judiciary Committee that:[31]

> The fundamental legal principle underlying the equal rights amendment, then, is that the law must deal with the individual attributes of the particular person, not with a vast over-classification based upon the irrelevant factor of sex. It should be noted at this point that there is one type of situation where the law may focus on a sexual characteristic but the basic principle just stated has no application.
>
> This occurs where the legal system deals directly with a physical characteristic that is unique to one sex. In this situation it could be said that,

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[30] Hearings on S.J. Res. 61 and S.J. Res. 231 before the Committee on Judiciary, U.S. Senate, 91st Cong., 2d Sess. 430, n.7 (1970). (Hereinafter cited as "ERA Senate Judiciary Committee Hearings.") Professor Emerson was the successful counsel who prepared the brief and argued the precedent-making case, *Griswold* v. *Connecticut*, 381 U.S. 479, involving the important issue of the right to privacy.

[31] ERA Senate Judiciary Committee Hearings 298-9.

> in a certain sense, the individual obtains a benefit *or is subject to a restriction*, because he or she belongs to one or the other sex.
>
> Thus a law providing for payment of the medical costs of childbearing would cover only women, and a law relating to sperm banks would restrict only men. Such legislation cannot be said to deny equal rights to the other sex. There is no basis here for seeking or achieving equality. [Emphasis added.]

And in his testimony before the House Subcommittee, Professor Emerson said:[32]

> . . . the equal rights amendment does not preclude legislation, or other official action, which relates to a physical characteristic unique to one sex. . . . So long as the characteristics is [sic] found in all women and no men, or all men and no women, the law does not violate the basic principle of the equal rights amendment; for it raises no problem of ignoring individual characteristics in favor of a prevailing group characteristic or an average.[33]

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[32] ERA House Hearings 402.

[33] Professor Emerson's statements were recently echoed in the Ohio State Law Journal: "There are many statutes and regulations to prevent hemophiliacs and colorblind persons from driving or holding certain jobs, and yet the judiciary does not customarily view such burdens as offending males generally. The fact that these sex linked traits exhibit their symptoms exclusively in males would be viewed as fortuitous and incidental to regulations which speak narrowly to the underlying conditions. A similar cultural habit of mind tends to prevent judges from viewing criminal rape statutes as offending males generally nor prosecutions of prostitution to females generally." Note, Equal Protection and The Pregnancy Leave Case, 34 Ohio State L.J. 628, 631 (1973).

In sum, the legislative history underlying the ERA teaches that not every differentiation based on sex-related physical characteristics is unlawful; and that where, as with the pregnancy exclusion in the California statute, there exists a basis for differentiation predicated on the unique characteristics of the female sex, a classification based on such differentiation is neither unreasonable nor unlawful.[34]

IV. The Current EEOC Sex Discrimination Guideline Relating To Pregnancy And Childbirth Disabilities Is Not Entitled To Judicial Deference Because It Is In Direct Conflict With The EEOC's Prior Interpretation, As Well As With Positions Expressed By Other Federal Agencies And The Congress.

We anticipate that the Equal Employment Opportunity Commission's current guideline relating to the treatment for job-related purposes of disabilities due to pregnancy or childbirth, *supra* note 2, may be

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[34] Nothing in the legislative history underlying the sex discrimination prohibition in Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2(a)) is in any way contradictory of the ERA history. Indeed, a statement by Senator Humphrey, the effective manager of the pending Senate bill, shows that the Senate, at least, did not take the simplistic view that the sex discrimination prohibition must be applied automatically against any employer action which affects male and female employees differently. Thus Senator Humphrey explained that the Bennett Amendment (110 Cong. Rec. 13647) to the bill, the purpose of which was to avoid conflicts between the sex discrimination prohibition and the Equal Pay Act, made it "unmistakenly clear" that despite the latter prohibition *"difference of treatment in industrial plans, including earlier retirement options for women, may continue in operation under this bill if it becomes law"* [Emphasis supplied]. 110 Cong. Rec. 13663-4 (1964).

cited to the Court in support of the decision below. For this reason, and even though the court below did not expressly advert to the guideline, we comment on it here in order to show that it is not entitled to the deference normally accorded administrative interpretations.[35]

Historically, Guidelines on Discrimination Because of Sex were originally issued by the EEOC on November 24, 1965 (30 Fed. Reg. 14926); they were amended by the EEOC on February 21, 1968 (33 Fed. Reg. 3344); were again amended on August 19, 1969 (34 Fed. Reg. 13367); and were last amended and revised effective April 5, 1972 (37 Fed. Reg. 6835). The earlier guidelines expressed no view with respect to the way disabilities resulting from pregnancy or childbirth were to be treated. Indeed, the topic was adverted to in the guidelines for the first time in 1972 when with the issuance of the amendments of April of that year, the guidelines in their present form were published.

The first public expression by the EEOC on the treatment of pregnancy under Title VII appeared in

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[35] As set forth above, the EEOC guidelines on sex discrimination were promulgated to implement the statutory prohibition against sex discrimination in Title VII of the Civil Rights Act of 1964. Both the pertinent statutory provisions and the relevant current guidelines are quoted, *supra*, at pp. 3-4. In pertinent part the current, 1972, guideline relating to pregnancy disabilities provides: "Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment." 29 C.F.R. 1604.10.

a series of opinion letters issued by the EEOC's General Counsel in 1966. Therein the EEOC's then position as to whether pregnancy had to be treated as an illness was thus set forth:

> The Commission policy with respect to pregnancy does not seek to compare an employer's treatment of illness or injury with his treatment of maternity, since maternity is a temporary disability unique to the female sex and more or less to be anticipated during the working life of most women employees. . . . we do not believe that an employer must provide the same fringe benefits for pregnancy as he provides for illness. . . .

Further, the EEOC's then position on the specific question of whether pregnancy need be covered under a disability insurance benefit plan was also set forth:

> . . . an insurance or other benefit plan may simply exclude maternity as a covered risk, and such an exclusion would not in our view be discriminatory.[36]

In testimony given in *Gilbert* v. *General Electric Company, supra*, a former EEOC General Counsel,[37] who occupied that office for some 15 months in 1965

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[36] The excerpted passages set forth in the text were identified as representative of statements in EEOC opinion letters prepared and sent out by the EEOC General Counsel during 1965-1966. The letters were sent out and made public in response to inquiries made of the Commission. Testimony of Charles Duncan, Esq., former EEOC General Counsel, in *Gilbert* v. *General Electric Company*, No. 142-72-R, E.D. Va. See the Appendix hereto.

[37] Charles Duncan, Esq., currently President of the District of Columbia Bar. Pertinent excerpts from Mr. Duncan's testimony in the *Gilbert* case are set forth in the Appendix hereto.

and 1966, stated without contradiction that the quoted statements from the 1966 letters reflected official EEOC policy during his incumbency as General Counsel. He further testified: (1) during the first year of the EEOC's existence—i.e., the year beginning July 2, 1965—questions and problems respecting sex discrimination "occupied a good deal of the Commission's attention" and "were thoroughly discussed by the Commission," and, during the same period, the treatment of pregnancy disabilities under an employer's disability insurance plan was specifically considered by the full Commission; (2) in formulating its 1965-1966 policy, the Commission considered and inquired into the legislative history underlying Title VII with respect to sex discrimination; (3) the Commission's 1965-1966 policy and position was that pregnancy could be treated differently from "medical illness," and that under an employer-sponsored employee disability insurance plan it was not necessary "to provide the same benefits for maternity absence [as] for illness-caused absence;" and (4) in the course of its 1965-1966 deliberations on sex discrimination, the Commission "extensively considered" and discussed as a possible alternative the policy reflected in the current EEOC guidelines with respect to the treatment of pregnancy-caused disabilities under employee disability insurance plans, considering such a policy in the light of the legislative history underlying Title VII, but consciously and deliberately rejecting it (Tr. 559, 561-564, 566-567). The EEOC policy and position thus described is reflected in a Commission Decision (No. 70-360) issued on December 16, 1969, which states in part: "The Commission policy with respect to pregnancy does not seek to compare

an employer's treatment of illness or injury with his treatment of maternity, since maternity is a temporary disability unique to the female sex. . . ." The 1969 Decision is reproduced in CCH EEOC Decisions ¶ 6084.[38]

Not only is the current EEOC guideline a departure from the prior interpretation of the statute by the EEOC, but it also contradicts the position of other federal agencies. Thus, the Sex Discrimination Guidelines promulgated by the Secretary of Labor pursuant to Executive Order 11246 (3 C.F.R. 173)[39] do not require that employee medical benefit plans cover pregnancy-related disabilities as long as an employer makes equal contributions to such plans for employees of both sexes (41 C.F.R. § 60-20.3(c)).[40] Moreover,

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[38] See also the following excerpt from a speech delivered to the Industrial Relations Research Association, Washington, D. C., Chapter by Sonia Pressman, then Senior Attorney, Office of the General Counsel, EEOC, on April 16, 1969, stating the EEOC's then position to be as follows: "The Commission . . . has not to date equated [pregnancy] with sickness. Thus, the Commission has ruled . . . that an employer may have a medical and hospital insurance plan which covers the expenses of delivery, but excludes disabilities related to pregnancy, childbirth, miscarriage, and abortion." CCH Employment Practices ¶ 8004 at p. 6005 (June 19, 1969).

[39] Executive Order 11246 is a Presidential order which prohibits government contractors and subcontractors from discriminating in employment on the basis of race, color, religion, sex, or national origin. "Sex" as a prohibited type of discrimination was added to the order by a 1968 amendment (32 Fed. Reg. 14303).

[40] On December 27, 1973, the Secretary of Labor published in the Federal Register (38 Fed. Reg. 35336) proposed revisions in the Guidelines which, *inter alia*, proposed that

regulations promulgated by the Wage and Hour Administrator under the Equal Pay Act, 29 U.S.C. 206(d), provide that payments relating to maternity are not wages for purposes of that statute (20 C.F.R. § 800.110), and further state (20 C.F.R. § 800.116 (d)):

> If employer contributions to a plan providing insurance or similar benefits to employees are equal for both men and women, no wage differential prohibited by the equal pay provisions will result from such payments, even though the benefits which accrue to the employees in question are greater for one sex than for the other.

In addition, the EEOC's current guideline on employment policies relating to pregnancy and childbirth is in direct conflict with the maternity sick leave benefits and leave policies established by other federal agencies for their own female employees. These policies deny advance sick leave benefits for pregnancy-related disabilities,[41] establish fixed peri-

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"medically verifiable disabilities which are related to pregnancy be treated as temporary disabilities." The Secretary went on to state: "The OFCC, however, recognizes the need to continue to be guided by pertinent judicial decisions, including those expected to be rendered by the United States Supreme Court during this present term." The views of interested parties were solicited.

[41] The Civil Service Commission policy provides that an employee may be granted up to a total of 30 days sick leave in advance of its accrual, but provides further that requests for advance sick leave for reasons of pregnancy "should" and "will" usually be denied; the policies of the NLRB, the Department of Justice, the Library of Congress, and the Department of Health, Education and Welfare are not to advance sick leave for pregnancy or confinement; the policies of the

ods for the commence ment of maternity leave,[42] and deny unmarried females "self-only" coverage for pregnancy and maternity hospitalization and doctors benefits under health benefits plans established pursuant to the Federal Employees Health Benefits Law and approved by the Civil Service Commission.[43]

THE EEOC itself, on December 20, 1972, and January 26, 1973, denied requests for advance of sick leave for reasons of pregnancy and confinement "except in cases of serious disability regarding the maternity aspect." On May 25, 1973, this policy was changed so that requests for advanced sick leave for reasons of pregnancy and confinement are treated the same as "other cases of serious disability regardless of the maternity aspect."[44] Not changed, however, was the EEOC's continuing requirement that its

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Department of Agriculture, the Forest Service, and the Office of the Secretary of Defense, Joint Chiefs of Staff, Court of Military Appeals, Defense Security Assistance Agency provide that advanced sick leave for reasons of pregnancy or confinement "should" not be allowed (Exhibits and Stipulations in *Gilbert* v. *General Electric Company, supra*).

[42] The Department of Justice, the Department of Agriculture, the Forest Service, and the Department of Health, Education and Welfare require their female employees to commence maternity leaves six weeks before the expected date of delivery (*Id.*).

[43] The American Postal Workers Union Plan; the Group Health Association Plan; National Association of Letter Carriers Plan; American Federation of Government Employees Plan (benefits payable for severe complications of pregnancy, but amount reduced by $250) (*Id.*).

[44] Presumably, the May 25, 1973, change was triggered by an exhibit list served by defendant GE in the *Gilbert* case, *supra*.

female employees begin maternity leave "not later than four weeks prior to the expected delivery" (EEOC Manual, 7-25-69). Exhibits and Stipulation in *Gilbert* v. *General Electric Company, supra*).

The EEOC, moreover, has *not* been consistent in its application of the 1972 guideline on employment policies relating to pregnancy and childbirth. As revealed in Federal Communications Commission rate increase proceedings involving American Telephone & Telegraph Company and 24 of its associated operating companies ("Bell Companies"), FCC Case No. 19143, in which the EEOC participated as a petitioner in opposition to AT&T and the Bell Companies, the Bell Companies provide their employees with up to 52 weeks of benefits because of absences from work due to physical disabilities caused by sickness, but exclude from benefit eligibility female employees on maternity leave who experience normal pregnancies. Yet, on January 18, 1973, after extensive negotiations, the EEOC, the Department of Labor, and AT&T on behalf of itself and the Bell Companies, signed an Agreement providing, *inter alia*, for the entry of a consent decree in a district court,[*] the resolution and discontinuance of all pending litigation concerning compliance by AT&T and the Bell Companies with all laws and regulations concerning equal employment opportunity, and the dismissal of the EEOC opposition to the proposed rate increases in the FCC proceedings. Although this Agreement

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[*] The provisions of the Agreement were in fact embodied in a Consent Decree entered in the United States District Court, Eastern District of Pennsylvania, on January 18, 1973. See § 1860, CCH Employment Practices Guide.

provides that adherence to its terms constitutes full compliance with all laws and regulations governing equal employment opportunity, it imposes no obligation on AT&T or the Bell Companies to discontinue their current policy and practice of not paying sickness benefits to their female employees who are absent from work as the result of normal pregnancies (Exhibits and Stipulations in *Gilbert* v. *General Electric Company, supra*).[46]

Casting even more doubt on the EEOC's guideline as a valid interpretation of Congressional intent, is the fact that Congress itself has repeatedly passed statutes authorizing different treatment for men and women in similar or identical circumstances.[47] Per-

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[46] On April 13, 1973, a class action against one of the Bell Companies, Illinois Bell Telephone Company, alleging sex discrimination against female employees by the failure to provide disability insurance benefits for pregnancy-related disabilities was subsequently filed in the District Court for the Northern District of Illinois, after the issuance of a right to sue letter and a determination of probable cause to believe Title VII had been violated in this respect by an EEOC District Director (Exhibit and Stipulation in *Gilbert* case, *supra*). See also *Wisconsin Telephone Company* v. *Dept. of Industry, Labor and Human Relations, Etc.*, 6 EPD ¶ 8937 (Wis. Cir. Ct. Nov. 19, 1973), holding that Wisconsin Telephone Company, a Bell Company, can continue its practice of not paying sickness disability benefits for pregnancy.

[47] See, e.g., Coast Guard, 14 U.S.C.A. § 762 (husband of member of Women's Reserve not a dependent unless in fact dependent on her for support); Coast Guard, 14 U.S.C.A. § 490 (death gratuity to widows); Pay and Allowances to Military Personnel, 37 U.S.C.A. § 401 (a person is not a dependent of a female member unless in fact so dependent on her for over one-half of his support); Pay and Allowances to Military Personnel, 37 U.S.C.A. § 551 (dependent defined as "his

wife"); Veterans' Benefits, 38 U.S.C.A. § 315 (additional compensation for "wife" of disabled veteran); Veterans' Benefits, 38 U.S.C.A. § 321 (basic entitlement for "surviving widow" of veteran); Veterans' Benefits, 38 U.S.C.A. § 322 (rates of death compensation for "widow" of veteran); Veterans' Benefits, 38 U.S.C.A. § 341 (basic entitlement for "surviving widow" for peacetime death); Veterans' Benefits, 38 U.S.C.A. § 411 (dependency and indemnity compensation to a "widow"); Veterans' Benefits, 37 U.S.C.A. § 412 (benefits to a "widow" in certain cases of in-service or service-connected deaths); Veterans' Benefits, 38 U.S.C.A. § 531, § 532, § 534, § 536, § 541 (benefits to "the widows" of veterans of various wars); Veterans' Benefits, 38 U.S.C.A. § 544 (aid and allowance to "any widow" entitled to a pension); Veterans' Benefits, 38 U.S.C.A. § 1700 and 1701 (educational assistance program for the "widows" of veterans); Public Lands, 43 U.S.C.A. § 171 (rights of "wife" of homesteader who "has been abandoned and deserted by her husband"); Public Lands, 43 U.S.C.A. § 278 (right of "widow" of veteran to make entry); Shipping, 46 U.S.C.A. § 601 (attachment of seaman's wages may not interfere with wages "for the support and maintenance of his wife"); Labor, 29 U.S.C.A. § 11-§ 14 (establishment, appointments, powers and duties of Women's Bureau in Department of Labor); Armed Forces, 10 U.S.C.A. § 3297, § 3311, § 3296 (the Women's Army Corps); Armed Forces, 10 U.S.C.A. § 505 (distinctions made between men and women on minimum enlistment age and length of original enlistment); Patriotic Societies and Observance, 36 U.S.C.A. § 177 (different required observances for men and women during hoisting and lowering of flag); Public Contracts, 41 U.S.C.A. § 35(d) (different minimum employment ages for males and females); Lighthouses, 33 U.S.C.A. § 771 (benefits for widows of lighthouse personnel); Internal Revenue Code, 26 U.S.C.A. § 7448 (annuities to "widows" of tax court judges); Judiciary and Judicial Procedure, 28 U.S.C.A. § 604 (regulation and payments of "annuities to widows . . . of judges"); Judiciary and Judicial Procedure, 28 U.S.C.A. § 375 and § 376 (annuities to "widows" of justices and judges); Internal Reevnue Code, 26 U.S.C.A. § 214 (determination of certain deductions de-

haps the most significant indication of Congressional intent in this respect is the legislative history of the recent ERA amendment. As set forth above, pp. 30-37, that history discloses that Congress expressly intended to permit pregnancy to be differentiated from matters covered by the amendment.

It is settled law that administrative interpretations which have not been consistently adhered to, and which are not contemporaneous with the enactment of a law, are not entitled to the judicial deference normally accorded agency interpretations. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Thus in *F.T.C.* v. *Jantzen, Inc.*, 356 F.2d 253 (9th Cir. 1966), *rev'd on other grounds*, 386 U.S. 228 (1967), the court stated the principle as follows (356 F.2d at 254, n.4):

> . . . we owe little, if any, deference to the Commission's views as to what the statute does. A consistent interpretation of a statute by the body created to administer it is indeed entitled to judicial respect. But it goes beyond all reason to apply the same rule to diametrically inconsistent positions taken by such a body. If we owe any

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pendent on male or female, husband or widow status); Internal Revenue Code, 28 U.S.C.A. § 3121 (differentiation between men and women regarding age after which remuneration will not be considered "wages"); Foreign Service, 22 U.S.C.A. § 1079(d) (grants to needy ineligible "widows"); Minerals Lands and Mining, 30 U.S.C.A. § 922 and § 902 (benefits to "widow" of deceased miner).

Whether or not these statutes would survive an attack under the Fourteenth Amendment is not material here. What is important is the intent of Congress is passing Title VII. Cf. *Frontiero* v. *Richardson*, 411 U.S. 677 (1973).

> deference to the Commision's views, it is to those that were contemporaneous with the enactment of the statute. . . .

In *Udall* v. *Tallman*, 380 U.S. 1, 16-23 (1965), the Court gave deference to an interpretation of the Secretary of the Interior only after a detailed analysis showed that his interpretation had been contemporaneous, consistent, heavily relied upon, and was not unreasonable. In *Griggs, et al.* v. *Duke Power Company*, 401 U.S. 424, 436 (1971), the Court did not accept the EEOC guidelines on employment testing as the proper interpretation of Title VII until it was convinced by a thorough review of the legislative history that the construction "comports with Congressional intent." The elements of agency consistency and contemporaneous construction were emphasized by the Court in *National Labor Relations Board* v. *Boeing Co.*, 412 U.S. 67, 75 (1973), in upholding the Board's position that it was not required to inquire into the reasonableness of union-imposed fines.[*] These cases demonstrate, we submit, that judicial acceptance of administrative interpretations depends upon careful scrutiny; or, as the Court said in *Skidmore* v. *Swift & Co.*, *supra*, 323 U.S. at 140:

> The weight of such a judgment [i.e., the administrative interpretation] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its con-

[*] In *Iselin* v. *United States*, 270 U.S. 245, 251 (1926) the Court, in an opinion written by Mr. Justice Brandeis, stated that the regulation "cannot be given the force and effect of law" because "the construction [of the statute by the regulatory agency] was neither uniform, general, nor long continued."

sistency with earlier and later pronouncements and all those factors which give it power to persuade, if lacking power to control.

See also *Espinoza* v. *Farah Manufacturing Co.*, —— U.S. ——, 38 L. Ed. 2d 287 (Nov. 19, 1973), where the Court refused to follow an EEOC guideline equating discrimination on the basis of citizenship with the Title VII proscription against discrimination on the basis of national origin. The Court cited these reasons for rejecting the EEOC's guideline interpretation: (1) the guideline position was contrary to the Congressional understanding of the term "national origin," as shown by, among other things, Congressional enactments in related areas (". . . deference [to the EEOC guideline] must have limits where, as here, application of the guideline would be inconsistent with an obvious Congressional intent not to reach the employment practice in question," 38 L. Ed. at 295); (2) the guideline position was inconsistent with a "general understanding" [••] of the

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[••] In *Brennan* v. *General Telephone Co.*, —— F.2d ——, 21 WH Cases (BNA) 415, 417 (5th Cir., Nov. 16, 1973), the Fifth Circuit listed the various reasons for according weight to administrative interpretations, referring to a "reenactment of the statute in circumstances which indicate legislative approval." Here, of course, the enactment of Title VII's sex discrimination prohibition occurred in the context of prior interpretations by state legislators and administrators which show that the contemporaneous "general understanding" was that the pregnancy exclusion here in issue was not unlawful. Thus GE's Labor Relations Counsel testified in *Gilbert* v. *General Electric Company, supra*: "When the Act was passed it was passed in the context of the existence of a number of statutes in states in which GE operated, as I have indicated, which for years had prohibited sex discrimination. Many of

term's meaning, as shown by federal regulations and the statutes of various states (38 L. Ed. at 291, n.2); and (3) the guideline position was contrary to an earlier Commission position expressed "through its General Counsel" (38 L. Ed. at 294).[*] The *Espinoza* case therefore is of controlling significance with respect to the EEOC's 1972 guideline on pregnancy and childbirth disabilities: the guideline is contrary to Congress's understanding of what is meant by sex discrimination (see *supra*, pp. 30-37); (2) the 1972 guideline sets forth a position inconsistent with state statutes and administrative interpretations by state and federal agencies (see *supra*, pp. 41-45, and note 49); and (3) the 1972 guideline completely reverses the EEOC's earlier position, as first expressed by its General Counsel (see *supra*, pp. 37-41).

In sum, in view of the principles outlined above, the EEOC's 1972 sex discrimination guideline relating to pregnancy and childbirth disabilities is not entitled to judicial deference: First, having been issued some seven years after Title VII went into effect, the guideline does not represent a "contemporaneous construction;" and it certainly is inconsistent

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those Fair Employment Commissions in those states charged with the enforcement of those Acts were aggressive and we had many complaints and investigations over the period of time prior to 1964. At no point in time did any state agency ever question the exclusion of pregnancy from the S and A benefits in the period beginning 1950 through 1964" (Tr. 446).

[*] When the *Espinoza* case was before the Court of Appeals, the Seventh Circuit likewise refused to follow the EEOC's guideline, saying with respect to it: "While acknowledging deference is due, blind adherence is not." 462 F. 2d 1331, 1334 (7th Cir. 1972).

with the previous contemporaneous, and thoroughly considered, 1966-1971 EEOC position and policy. Indeed, only the 1966-1971 EEOC policy and published construction, reflecting the judgment of those entrusted with setting Title VII's machinery in motion, meet the criteria for deference as enunciated by the Supreme Court.[51] Second, the guideline is also directly contrary to the positions of other federal agencies which have dealt with the identical subject; is in conflict with employment policies established for pregnant female employees of many government agencies, including, until May 25, 1973, the EEOC itself; and is, in addition, inconsistent with other expressions of Congressional intent.

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[51] No weight attaches to the 1972 guideline by reason of the fact that it was issued shortly after the effective date of the 1972 Amendments to Title VII, because there was no change in the sex discrimination provisions of the statute which would justify changing the EEOC's prior position on employment policies relating to pregnancy and childbirth. Indeed, it can be strongly argued that the Congress in passing the 1972 amendments without changing the "sex" provision must have known, and approved by implication, the published opinions of the 1966-1971 period.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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Dated: February 1974.

APPENDIX

Excerpts from the Official Transcript of Proceedings in *Gilbert* v. *General Electric Company*, No. 142-72-R, United States District Court for the Eastern District of Virginia:

* * * *

[542] *CHARLES DUNCAN* was called as a witness by and on behalf of the defendant and, having been first duly sworn, was examined and testified on his oath as follows:

* * * *

[549] DIRECT EXAMINATION

BY MR. STRAUSS:

Q Would you state your name and residence address, sir?

A Charles T. Duncan, D-u-n-c-a-n, 1812 Upshur, U-p-s-h-u-r Street, NW, Washington, D. C.

Q Mr. Duncan, what is your occupation or profession?

A I am an attorney at law admitted to practice in the District of Columbia.

* * * *

[550] Q Are you an officer of the District of Columbia Bar?

A Yes. We have a unified D. C. Bar and I am this year President of that organization.

Q Now, prior to your becoming engaged in the private practice of law in the District of Columbia were you employed in an official capacity by the District of Columbia Government?

A Yes. I was Corporation Counsel for the District of Columbia.

* * * *

[551] Q You were, were you not, at one time, employed by the EEOC?

A Yes, I was.

Q And in what capacity were you so employed?

A I was General Counsel of the Equal Employment Opportunity Commission.

Q And would you pinpoint the dates?

A I believe I became General Counsel on August 8, 1965, and I took the oath of office as Corporation Counsel on October 31, 1966.

I assume I went off the EEOC payroll on that date, but I am not sure.

Q You just don't remember, but in view—

A It was sometime very late in October.

Q In October, 1966?

A That is correct.

* * * *

[553] Q Mr. Duncan, the letter[s] which represent the Defendant's Exhibit Number 12, are you the author of the letter[s]?

A Well, let me respond this way. These letters were prepared in my office. As to whether I drafted particular language, I don't remember that, but I do recognize the two letters as being letters which were prepared in my office or certainly similar to letters which were prepared in my office.

* * * *

[555] Q Is it a fair statement to say, sir, that letters containing . . . similar opinions to those expressed therein were sent out by you before you left the Commission in response to inquiries made of the Commission?

A Yes.

* * * *

[559] Q Do you recall whether letters setting forth opinions such as those [set] forth in Defendant's Exhibit 12 were discussed at any time with the Commission?

A You mean on the specific point of pregnancy? Maternity leave?

Q The matters discussed and set forth in those letters?

A Yes.

This was one of the issues that I would not have decided on my own initiative, and indeed did not.

This particular question, how to treat [560] pregnancy and maternity leave, was particularly discussed at the Commission level and with senior staff in order to formulate the Commission's policy.

Q What about the matter of the treatment of pregnancy disabilities under an employment—under an employer's disability plan?

A That subject was discussed at the Commission level.

Q Do you recall who was present at these discussions?

A I cannot pinpoint a discussion or a date. I do know that this question was considered by the full Commission, and I know who the Commissioners were.

Q Now, do the letters, that is, do the letters which are in evidence as Defendant's Exhibit 12 reflect the policy of the EEOC during your incumbency as General Counsel with respect to the treatment of pregnancy disabilities under an employer disability benefit plan?

A Yes.

* * * *

[561] Q Now, how thoroughly was this matter discussed within the Commission?

A I would have to answer you this way. The whole question of sex discrimination occupied a good deal of the Commission's attention during the first year.

Pregnancy, maternity leave was one aspect of the sex discrimination.

It was also one of the problems that I think baffled the Commission the most. So I would say that this aspect of sex discrimination certainly as well as the broader problem of other aspects of sex discrimination were thoroughly discussed by the Commission.

Q When the Commission was consider[ing] the formulation of these policies which are set forth in the exhibit, was there any consideration given to the legislative history of Title 7 with respect to sex discrimination?

A Unfortunately, Mr. Strauss, as I am sure you know, there is little or no legislative history of Title 7 insofar as sex discrimination was concerned.

We wished that there had been some, but as you know, the word was added to race, color, religion, et cetera, not fortuitously but without any legislative history.

[562] Q But whatever legislative—but you did make an inquiry into the question of whether there was explicit legislative histroy?

A Oh, indeed, because in interpreting Title 7 we relied heavily on the legislative history whenever it was available. I am saying in the instance of sex discrimination there wasn't any.

* * * *

[563] Would you look at the last sentence, please, in the November 15 letter?

A Yes.

Q Would you explain, if you can, what the term "fringe benefits" means as used in that sentence?

A Yes. Fringe benefits would include wage continuation, pay, pay in the nature of sick pay, hospitalization, any other benefit like that applied in the case of absence due to other illnesses. But I think the chief thing was pay.

Q Pay continuation, are you saying?

A Yes.

Q During pregnancy?

A Yes. During the absence.

Q Whether or not the pregnancy was covered by a disability policy, is that what this refers to?

A No. I am trying to say that it was the Commission's position that pregnancy could be treated differently from a medical illness and that it was not necessary to make the same provision in the case of pregnancy as was made in the case of medical illness, be [564] it under company policy or under various sickness and health plans.

Q Now, would you look, please, at the November 10 letter, Mr. Duncan, and in particular to the last two paragraphs thereof?

A Yes.

Q I note that there is a reference in there to an employee disability plan, benefit plan financed by both the employer and the employees.

Would the response set forth in the letter have been any different had the letter been concerned with a disability benefit plan sponsored by the employer alone?

A No, clearly not. It was put that way because that is the way the question was put to us. It was our style to answer the question as asked. However

the plan is financed, on a contributory basis or solely by the employer, the Commission's policy was that you did not have to provide the same benefits for maternity absence that you did for illness-caused absence.

* * * *

[566] Q Mr. Duncan, to get on with it, have you had occasion to read the guidelines on discrimination because of sex which were issued by the EEOC in 1972?

A Yes, I have.

Q How recently was that?

A As recently as today.

Q You [are] then familiar with the policies expressed in such guidelines, that is the 1972 guidelines, concerning the matter of disability insurance coverage and so-called pregnancy and childbirth disabilities?

A Yes.

Q Now, in 1966 when the policy formulated in the letter[s] we have here was taking place, was there any discussion within the Commision of a policy such as appears in the 1972 guidelines?

A I would say yes, Mr. Strauss, to the best of my recollection.

As I indicated earlier, the Commission policy [567] on this point was extensively considered, various alternatives for treating this problem, how do you handle maternity leave, various alternatives were discussed.

One of the alternatives that was discussed was, necessarily, would have been to treat it as an illness-induced absence. So that was discussed, yes.

Q And rejected?

A Well, the Commission's policy was as these letters state.

Q So that this may be clear, [it] may have been evident, but I presume then that when the so-called 1972 policy was discussed in connection with the 1966 formulation the presence or absence of legislative history was also discussed at the same time?

A I am sure it was. I don't specifically remember that.

* * * *